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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ANGELO COLELLA,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Angelo Colella, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on April 21, 1966.

OPINIONS BELOW

The United States District Court for the District of Puerto Rico issued no opinion in this case. The opinion of the Court of Appeals, which has not yet been reported, is reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1966. On May 13, Mr. Justice Fortas entered an order extending the time for filing a petition for a writ of

certiorari in this case to and including June 20, 1966. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the seizure of certain documents from petitioner's suitcase at the time of his arrest violated the Fourth Amendment and, if so, whether the Court of Appeals erred in affirming the conviction because the petitioner had not shown on appeal that any of the Government's evidence was derived from those documents, although the trial court had held no hearing on this question.

2. Whether criminal intent must be specifically alleged in an indictment for an offense of which such intent is a necessary element, and, if so, whether the indictment in this case should have been dismissed for failure to allege criminal intent.

3. Whether the trial court, by refusing to instruct the jury as to what would constitute a reimbursable expenditure for a "union purpose," erroneously permitted the jury to convict the defendant under Section 501(c) merely for obtaining reimbursement for expenditures of which the jury disapproved, even if it found that such expenditures were made on the union's behalf or were expressly authorized by defendant's superiors to be made on behalf of the union.

4. Whether the defendant's motion for a judgment of acquittal should have been granted because of the absence of any evidence that he had obtained more funds from the union, by way of reimbursement for expenses, than he had actually spent for union purposes.

5. Whether defendant's Fifth Amendment right to a fair trial and privilege against self-incrimination were violated by the trial court's insistence that the opening statement of defense counsel be made before the Government had presented its evidence.

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULES INVOLVED

This case involves the Fourth and Fifth Amendments to the Constitution of the United States; Section 501(c) of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 535, 29 U.S.C. § 501(c); and Rules 7(a), 7(c), and 41(e) of the Federal Rules of Criminal Procedure. The pertinent provisions thereof are set forth in full in Appendix A to this petition.

STATEMENT OF THE CASE

The petitioner, Angelo Colella, is an "International representative" of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter referred to as IUE). He has been employed by IUE since 1952 (R. 516). His duties include organizing workers into the IUE, preventing the defection of IUE members, and assisting organized IUE local unions in the conduct of collective bargaining, strikes, and other union activities.

In the spring of 1961, Mr. Colella, whose home is in Massachusetts, was sent by the then Secretary-Treasurer of the IUE, one Alvin F. Hartnett, to Puerto Rico. His assignment, as summarized by the Court of Appeals, was "to stave off a threat from allegedly communist forces to take over IUE's local unions, to settle a major strike, to resolve a dispute among officers of IUE's largest local, to consider the merits of an internal administrative reorganization, and generally to improve IUE's image in Puerto Rico. (Appendix B, p. 32). He remained in Puerto Rico from February until June, 1961, during which time he "helped bring about the affiliation with IUE of five locals; participated in two strikes and settlements that were favorable for IUE; helped in two other negotiations; advised on grievances with two other companies; helped resist raids from hostile unions in two other cases; and, in the opinion of one witness, im-

proved the public image of IUE in Puerto Rico." (Appendix B, p. 32).

Two years later, in February, 1963, a criminal complaint was filed against Mr. Colella by an FBI agent, alleging that during his stay in Puerto Rico in 1961 he had "willfully and unlawfully embezzled and converted to his own use monies belonging to the [IUE] by willfully and unlawfully falsifying statement concerning expenses at the Villa Parguera Hotel." (R. 5). The complaint stated that it was based upon an FBI investigation, and that Rondolfo Ronda of the Villa Parguera Hotel was a material witness.

On the basis of this complaint, an arrest warrant was issued by a United States Commissioner in Puerto Rico (R. 6), and Mr. Colella was arrested pursuant to that warrant on February 14, 1963.

The Arrest, Search, and Seizure

The arrest was made by two Special Agents of the FBI, Julius Peterson and James M. Coady, at the Playa Guest House in Isla Verde, Puerto Rico, where Colella and the new Secretary-Treasurer of IUE, George Collins, were staying in adjoining rooms at the hotel. After observing Colella and Collins enter room 7 of the hotel at 2:03 A.M. on February 14, 1963, the agents knocked on the door of the room. Collins opened the door, and the FBI agents identified themselves to him. Collins invited them in, and, when asked where Colella was, stated that he was in the next room. The Agents then went to the next room, called Colella out of the bathroom, and informed him that they had a warrant for his arrest. They then searched his person and also a suitcase which was open on the bed. They removed from the suitcase a large manila envelope and a yellow legal size tablet. They then bound Colella's hands with a necktie and took him before the U.S. Commissioner. (R. 19-24). He was then committed to jail. (R. 7).

The property which was taken from Colella's suitcase at

the time of his arrest consisted of numerous letters and other documents, as well as some personal handwritten notes. The notes appear in the certified record as Defendant's No. 36 for Identification, and the other documents appear as Defendant's No. 38 for Identification. None of these materials were placed in evidence at the trial, but all of them relate in one way or another to the subject of IUE representatives and their expense statements. They include copies of letters sent by the President of the IUE to a number of International representatives informing them that questions had been raised concerning their expense vouchers, and requesting an explanation; the answers of several of these representatives, including Colella, to these letters from the President; other correspondence on the same general subject; some internal records and communications of an organization known as Congress Industrial Organizers or CIO, of which Colella was President, and whose membership consisted of the IUE field staff; a letter from an accounting firm, Main & Company, to an IUE official listing the names of field representatives whose expenses had been found questionable in an audit of IUE's books; and similar matters. The handwritten notes pertained to one Frank Mendez, who subsequently testified before the Grand Jury (R. 31-32), and one Sylvia Ugarte, who subsequently was a key Government witness at the trial. (R. 226-272).

The Indictment

On February 20, 1963, a Federal Grand Jury returned an indictment against Colella containing 6 counts, each of which purported to allege a separate violation of Section 501(c) of the Labor Management Reporting and Disclosure Act of 1959, which prohibits union officers and employees from embezzling, stealing, or unlawfully and willfully abstracting and converting union funds or property. (R. 8-12). Each of the counts was drafted in similar fashion, of which Count One is illustrative:

"On or about the Month of March, 1961, the exact date to the grand jurors unknown, in the District of Puerto Rico and within the jurisdiction of this Court, ANGELO COLELLA, the defendant herein, while employed by the International Union of Electrical, Radio and Machine Workers (IUE) AFL-CIO, a labor organization within the meaning of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402(i) and (j), embezzled, stole and unlawfully and willfully abstracted and converted to his own use, monies and funds belonging to said labor organization, approximately $174.30, which monies and funds were obtained by the defendant herein while acting as such employee on behalf of the said labor organization, in the following manner:

"The defendant ANGELO COLELLA falsified vouchers to be reimbursed for hotel expenses incurred while allegedly staying at the La Rada Hotel, Santurce, Puerto Rico, during the month of March, 1961, falsely showing expenses to be $159.35 and $194.70, when he well knew that the true expenses incurred were in the amount of $179.75. He received payments from the aforementioned labor organization in accordance with the referred falsified vouchers."

The other counts differed only as to the amount of money involved and the nature of the false expense voucher. Thus, Count 2 alleged a false voucher for $50.80 for expenses at the Hotel Villa Parguera, Puerto Rico. Count 3 alleged a false voucher for $2,012.00 for expenses at the Escambron Beach Hotel, San Juan, Puerto Rico, of which only $688.14 was actually spent at that hotel. Counts 4, 5, and 6 each alleged false vouchers for automobile rental expenses in the amounts of $240.00, $192.30, and $415.57 respectively.

On March 29, Colella was arraigned, and pleaded not guilty. (R. 1).

Defendant's Pre-Trial Motions

On March 29, Colella filed motions to dismiss the indictment (R. 13), and for the suppression and return of the evidence taken at the time of his arrest. (R. 14). A second motion to dismiss the indictment was filed on April 15 (R. 17-18).

The motions challenging the indictment claimed, among other things, that the indictment was defective in the following respects: it contained no allegation that Colella had made any personal profit or financial gain from the activities alleged (R. 13-14); it was duplicitous because each count, by embodying the statutory language "embezzled, stole, and unlawfully and willfully abstracted and converted to his own use," alleged several different crimes (R. 14, 17); it failed to allege criminal intent (R. 13); it failed to allege that Colella had held any of the funds in question in a fiduciary capacity (R. 13); and the statute itself is unconstitutionally vague. (R. 13).

The motion for the suppression of evidence and return of property challenged the validity of the arrest and the constitutionality of the search and seizure of Colella's property without a search warrant.

These motions were denied by the court without hearing oral testimony, solely on the basis of affidavits and argument. (R. 24).

On December 11, defendant filed a "supplemental motion for return of property and to suppress evidence" (R. 29), as well as a "supplemental motion to dismiss the indictment." (R. 31). In the former motion, defendant asked not only for the suppression and return of the property which had been seized, but also the suppression of "any information based upon it or developed from it." In the latter motion, defendant alleged that some of the papers which the Government had seized contained references to Frank Mendez, that Mendez had refused to give statements to the Government concerning this case prior to the seizure of

these papers, but that after the seizure Mendez gave testimony before the Grand Jury relating to all counts of the indictment. Thus, the motion contended, the indictment was the product of the illegal search and seizure and should therefore be dismissed.

These supplemental motions were argued before the court on December 14, the opening day of the trial. (R. 33-35). Again, no testimony was taken, and the motions were denied (R. 35).

The Trial.

After the Government made an opening statement summarizing the allegations of the indictment (R. 35-39), defense counsel requested leave to defer the defendant's opening statement until after the Government presented its evidence. This request was denied by the court. (R. 39). Accordingly, the defendant was forced to state his version of the case to the jury, and to reveal his theories and trial strategy to the Government, at the outset of the trial before the Government had introduced any of its testimony.

In his opening statement, defense counsel did not deny—indeed, he readily conceded—that Colella had submitted false expense vouchers to the IUE, as alleged in the indictment. He contended, however, that this was not for the purpose of personal enrichment. Rather, he explained, it was the policy of the IUE, as established by its chief financial officer, Secretary-Treasurer Hartnett, to have field personnel submit false vouchers showing inflated or fictitious hotel and auto expense in order to obtain reimbursement for certain actual authorized expenditures which they were instructed not to itemize on their expense statements. Thus, for example, counsel explained that union organizers were authorized to buy liquor for union members or prospective members attending union meetings or conventions, but they were told not to submit expense vouchers for liquor. Rather, they were instructed to cover such expenses by inflating or

fabricating a hotel bill or other type of expense. Similarly, counsel explained, Colella was authorized to bring his wife and family to stay with him in Puerto Rico,[1] but he was instructed not to mention that on his expense vouchers, but rather he was to submit some false vouchers to recover those expenditures. In short, defendant's position, in the opening statement and throughout the remainder of the trial, was that he had submitted false expense vouchers, but that he had been instructed to do so, and that all the money obtained by means of these vouchers was a reimbursement for certain actual expenditures which he had made on behalf of the IUE, and which he was authorized to make. (R. 39-43).

After the defendant had made this opening statement, the Government proceeded to put on its evidence. Aside from the necessary background evidence concerning the IUE bookkeeping system, the way in which expenses were claimed and reimbursed, etc., the Government's case in chief consisted principally of an effort to prove what the defendant had already conceded—that the expense vouchers referred to in the indictment were in fact false. No evidence was presented concerning how Colella had spent the money obtained by these vouchers, nor was there any evidence that Colella did not incur actual authorized expenses in the amounts claimed by the false vouchers. Indeed, one of the Government's witnesses, IUE Comptroller Richard Bauer, testified that Colella had been authorized to bring his family to Puerto Rico. (R. 152).

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[1] As explained in the opening statement, the union had asked Colella, who lives in Boston, whether he would stay in Puerto Rico for two years. He would not do so if the assignment required him to leave his wife and children for such an extended period and the Secretary Treasurer of the union therefore, according to Colella, told him to take them to Puerto Rico so that he could ascertain whether suitable living and schooling arrangements could be made so that they could move to Puerto Rico.

At the conclusion of the Government's evidence, the defense moved for a judgment of acquittal. The motion was denied, and the defendant proceeded to present his case.

The defense produced a number of witnesses, including several International representatives, who testified that there was a long-standing practice in the IUE for field representatives to submit false expense vouchers and receipts in order to obtain reimbursement for certain types of expenditures which they were instructed not to report, or for which they were unable to obtain receipts. (R. 296, 320-22, 322-35, 336-39, 348-51, 352, 360-61). One of the Government's witnesses, Sylvia Ugarte, had also so testified. (R. 241-42). There was testimony that Secretary-Treasurer Hartnett had specifically instructed the representatives to follow this procedure (R. 305-06, 323-25, 352), and that some of them had, on occasion, complained about it and sought to change it. (R. 344, 354).

A number of witnesses who had worked with Mr. Colella in Puerto Rico testified concerning the expenses which they saw him incur in the course of his duties during the period covered by the indictment. These expenses included the purchase of meals or refreshments for sizeable groups on literally dozens of occasions, giving money to destitute strikers faced with some immediate financial emergency, compensating local union officials for the wages they lost while attending to union business, and similar cash disbursements. (R. 364-85, 418-25, 449-54, 484-86, 500-03). These expenses were incurred in the course of organizing activities, strike activities, and collective bargaining activities at approximately 12 companies in Puerto Rico, plus certain meetings and activities related to internal union affairs, in the period of March through June 1961.

Colella testified in his own behalf. He also stated that he had been instructed by Secretary-Treasurer Hartnett to "cover" certain expense items, such as liquor, by inflating hotel or motel bills or automobile expense. (R. 517). He

admitted that his expense voucher for the La Rada Hotel was inflated as alleged in count 1 of the indictment, but he explained that he submitted that voucher to recover the expenses of a trip he had made to the Virgin Islands to investigate the possibility of organizing sugar workers there. (R. 523-26). He stated that he had been specifically instructed to make this trip by John Sullivan, an assistant to Secretary-Treasurer Hartnett. Sullivan, who also testified, corroborated this. (R. 476-77).

Colella also admitted the falsification alleged in the other counts of the complaint, but again testified that the purpose was not to enrich himself at IUE's expense, but to obtain reimbursement for certain actual expenses he had incurred in the course of his duties. Thus, for example, he testified that he visited one major strike, at Olympic Mills, almost every day during his stay in Puerto Rico, and spent a total of at least $1200 during that period in financial assistance to strikers, for which he was not otherwise reimbursed. (R. 533-37). He also reviewed in detail all of his activities during his stay in Puerto Rico, and the kinds of expenses he incurred and for which he obtained reimbursement by means of false expense vouchers. (R. 537-43). He estimated that these expenditures amounted to $700 to $800. (R. 543). Finally, he testified that the false vouchers for car-rental expense, referred to in the last three counts of the indictment, were submitted for the purpose of obtaining reimbursement for the expense of transporting his family to Puerto Rico. He explained that Secretary-Treasurer Hartnett had specifically authorized him to bring his family, and to obtain reimbursement in this manner, at a time when Hartnett requested him to extend his stay in Puerto Rico. (R. 544-45).

As a rebuttal witness, the Government produced Alvin Hartnett. At the time of the trial, he was an employer labor relations consultant, having been removed from his union office some years earlier. Hartnett denied ever authorizing

Colella to submit false expense vouchers. (R. 611-620). He also denied that he had requested Colella to extend his stay in Puerto Rico. (R. 637-39).

At the close of all the evidence, the defendant renewed his motion for a judgment of acquittal, which was summarily denied. (R. 651).

The judge instructed the jury that in order to convict the defendant they must find not only that the expense vouchers were false, but also that defendant "submitted his requests for payment with the criminal intent to obtain money which had not been spent for a union purpose and did thereafter use that money for a non-union purpose." (R. 679). The court did not, however, define what would constitute a "union purpose" or a "non-union purpose." The defendant had proposed instructions to the effect that any expenditure which was expressly authorized by defendant's union superiors would be an expenditure for a "union purpose," as well as any expenditure which (despite the absence of express authorization) the jury found to be for a union purpose. (Def. Instru. No. 11, 12, R. 692). The court refused to give these instructions. (R. 663).

The jury returned a verdict of guilty on all counts. (R. 686). The court imposed a suspended sentence, and placed Mr. Colella on probation for a period of three years. (R. 696).

The Decision of the Court of Appeals

On appeal, the United States Court of Appeals affirmed the conviction. As to the arrest and the search and seizure, the court held that the arrest was proper, but did not reach the question of the validity of the search and seizure. Even if the seizure of defendant's property was illegal, the court held, none of the items seized were used in evidence, and the defendant had not shown that the prosecution obtained either Frank Mendez's testimony before the Grand Jury or

any other evidence as a result of the search and seizure. (App. B, pp. 35-36).

As to the sufficiency of the indictment, the court first held that criminal intent was adequately alleged by the statutory term "willfully," as well as by the allegation that defendant "well knew" that the expenses claimed had not been incurred. The court then turned to the argument that the indictment was insufficient in its failure to allege a fiduciary relationship, which is an essential element of the crime of embezzlement. Conceding this to be true, the court nevertheless concluded that the absence of such an allegation was harmless under Section 501 (c). Adopting the view that 501(c) creates a single crime rather than several crimes, the court held that any conduct which would constitute embezzlement would also, in the absence of a fiduciary relationship, constitute stealing, abstracting, or converting, and would thus still be a violation of the statute.

The court also held that defendant's motions for acquittal were properly denied, and that the evidence was sufficient to support the guilty verdict.

Finally, the court examined the trial judge's jury instructions. The instruction that the defendant was a fiduciary as a matter of law was erroneous, the court held, in light of the absence of any such allegation in the indictment. The court concluded, however, that this did not vitiate the jury's verdict as to stealing, abstracting, or converting, which do not require a finding of a fiduciary relationship. In all other respects, the court concluded, the instruction was proper. The court rejected the argument that the trial judge had failed adequately to define conversion, stealing, or abstracting. It also rejected the argument that the charge should have given the jury guidance as to how to determine whether the defendant's expenditures were for a union or a non-union purpose.

REASONS FOR GRANTING THE WRIT

I

Once again this Court is faced with the problem of how to make effective the search and seizure provisions of the Fourth Amendment against the understandable, but unconstitutional, attempts of government officers to "grab" evidence to which they have no right.

In this case petitioner was arrested in a hotel room. In the room was an envelope of private papers—copies of correspondence relating to the union investigation of expense account discrepancies, the internal records of the organizers union (C.I.O.) of which petitioner was president, and similar matters—and a pad on which petitioner had written some notes dealing with the situation in Puerto Rico. The arresting F.B.I. agents, who had an arrest warrant, noticed the papers and asked about them. According to their own affidavits, they were told that they were "personal papers." Being so advised, they first examined and then seized them "incidental to the arrest." (R. 23).

It is clear that this seizure was unlawful. Conceding *arguendo,* the propriety of the search as incident to the arrest (*Harris* v. *United States,* 331 U.S. 145 (1947)), it is a plain violation of the Fourth Amendment to seize personal papers whose only value is evidential "even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States,* 255 U.S. 310." *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1932). The papers seized here (which are described in the petitioner's supplemental motion for return of property (R. 29-30)) were neither instrumentalities nor fruits of crime. Nor were they contraband, government property, or materials whose possession was unlawful. They were, simply, copies of correspondence between officials of the union and petitioner, as well as other union organizers being investigated by the union for expense account discrepancies, and other private correspondence. The petitioner's personal notes obviously were constitution-

ally immune to seizure. As Mr. Justice Brennan has said: "If a person commits his secret thoughts to paper that is no license for the police to seize the paper . . ." *Lopez* v. *United States*, 373 U.S. 427, 449 (1963) (dissenting opinion).

The District Court here nevertheless denied petitioner's motions, made both immediately subsequent to the indictment (R. 14) and at the opening of the trial (R. 29) for return of the property and to suppress evidence. (R. 25, 34). They remained in the Government's hands throughout the trial.

If the Court of Appeals had held the seizure of these papers to have been constitutional, its decision would present such a serious conflict with the principles established by the decisions of this Court in implementing the Fourth Amendment as to warrant not only a grant of certiorari but a summary reversal. The Court of Appeals, however, ducked this question. It held that it need not decide whether the petitioner's papers were lawfully seized and retained by the Government. The papers were not themselves presented to the trial jury, the court held, and the defendant had made no showing that the Government's evidence, either before the grand jury or at trial, was obtained as a result of the Government's examination of the papers.

This holding raises another important and perhaps more difficult question which has not been but should be decided by this Court: Is the defendant entitled to a hearing on the question of whether any of the Government's evidence was "a fruit of the poisonous tree," *Nardone* v. *United States*, 308 U.S. 338, 340 (1939), and if so, is the burden of proof on that issue on the defendant or on the Government?

This issue has arisen most sharply in the past in connection with wiretapping. In *United States* v. *Goldstein*, 120 F.2d 485 (1941), the Second Circuit, per Judge Learned Hand, first stated what it believed to be the law. As Judge Hand later restated the principle in *United States* v. *Coplon*, 185 F.2d 629, 636 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952):

> "The accused has the burden of proving that the prosecution in fact 'tapped' his wires [here substitute "unlawfully seized his papers"] but if he succeeds in doing so, the burden falls upon the prosecution to prove that the information so gained has not 'led' directly or indirectly, to the discovery of any of the evidence which it introduces."

On the other hand, the Fifth Circuit, in *Addison* v. *United States,* 317 F.2d 808, 812 (1963), *cert. denied,* 376 U.S. 905 (1964), seems to have held that the burden in such situations is on the accused, citing the identical language, in *Nardone* v. *United States,* 308 U.S. 338 (1939), which the Second Circuit relied on to come to the opposite conclusion. In the *Goldstein* case this Court adverted to the question but found it unnecessary to decide it. *Goldstein* v. *United States,* 316 U.S. 114, 116 (1942).

In the trial court, the question of whether the defendant was entitled to a hearing to determine what evidence the Government obtained as a result of the seized documents (and the question of who would have the burden of proof at such a hearing), never arose, because the court found the search and seizure to have been valid. The defendant had moved that the seized property be returned and that "any information based upon it, or developed from it, be suppressed as evidence against him." (R. 29). To what extent the evidence subsequently introduced by the Government was "based upon" or "developed from" the papers was never explored, because the trial court denied the motion without taking any testimony. The Court of Appeals could therefore say, quite easily, that "there is no showing that the fruits of the search were used, directly or indirectly, against the defendant."

Of course, there was no such showing. The Government had the papers. They in fact disclosed that a number of charges against Colella and a number of other union representatives had been made within the union and by the union's accountants, and that there had been internal pro-

ceedings within the union dealing with these charges, all long after the crimes charged in the indictment. But only the Government knew and could testify as to whether the papers in fact provided leads to the evidence which resulted in the indictment and trial of petitioner on six different charges of falsification of expense records (after he had been arrested for only one). And no hearing was ever held on that question.

The affirmance by the Court of Appeals on the basis that *petitioner* had not made a showing of prejudice thus clearly presents the question not only as to the burden of proof but also as to whether the petitioner was at least entitled to a hearing on this question. The court's action is in sharp contrast to the position taken by the Solicitor General in this Court only last month in *Black* v. *United States,* October Term, 1965, No. 1029. There, when it appeared that the accused's room had in fact been "bugged" prior to trial, the Government freely acknowledged his right to a hearing at which a full determination could be made and promised that the Government would come forward at such a hearing "to submit all the facts." (Memorandum for the United States, May, 1966, p. 5). It is precisely such a hearing that petitioner was denied in this case.[2]

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[2] It is, of course, no part of our burden at this point to show prejudicial use of the seized documents and, concededly, no such showing was made in the Court of Appeals. What is clear, however, is that the Government apparently thought the documents useful, since it resisted the motion to return them. And examination of the documents and of the record does indicate certain suspicious items. For example, the I.U.E.'s comptroller was subpoenaed and asked whether he had discussed claims of falsity with a number of IUE representatives whose names appear on a list in one of the seized papers. (R. 137-140). He was also asked about the C.I.O. (the union of I.U.E. staff representatives of which petitioner is president) and petitioner's relationship to it (R. 138) although insofar as appears the C.I.O.'s only connection with this case is that many of the seized letters dealt with C.I.O. affairs. See also the cross-examination of the defendant's witnesses with respect to their interest and role in the C.I.O. (R. 312, 315, 322, 342, 351, 358-59, 361-62).

II

This Court has never decided whether an indictment must expressly allege criminal intent when such intent is an essential element of the offense charged. This is an important question of federal law, on which the decisions of the Circuits are in conflict, and which should therefore be resolved in this case.

This question was presented in *Doyle* v. *United States,* 318 F.2d 419 (8th Cir. 1963), with respect to an indictment charging, in the statutory language, the same offense involved in the present case. Although recognizing that the indictment failed to allege criminal intent, the court there held that the test of the sufficiency of an indictment is whether it adequately apprised the accused of the nature of the offense charged, and that the indictment in that case met that test. Therefore, the court held, so long as the issue of criminal intent was properly presented to the jury, it was immaterial that it was not alleged in the indictment.

In a subsequent decision, the First Circuit has held precisely the contrary. *Hughes* v. *United States,* 338 F.2d 651 (1964), *rehearing denied,* 340 F.2d 609 (1965). In that case, the court set aside a conviction and remanded with directions to dismiss the indictment, on the sole ground that criminal intent had not been properly alleged, even though the issue had been submitted to the jury. The Government moved for rehearing, arguing that the proof of criminal intent, and the instruction to the jury, cured the defect in the indictment. In a *per curiam* opinion the court denied rehearing, holding that where criminal intent is an element of the crime, it must not only be proved, it must also be alleged in the indictment.

The *Hughes* decision, we submit, is clearly correct. An indictment is not a civil complaint, where the only requirement is notice to the defendant. Under the Fifth Amendment, before a defendant can be tried for "a capital or otherwise infamous crime" he must be indicted by a grand

jury. See also Rules 7(a), (c), Fed. R. Crim. Proc. This constitutional right plainly carries with it the right to have the grand jury determine, in the first instance, whether all the elements of the offense exist. See *Stirone* v. *United States*, 361 U.S. 212 (1960) and cases cited therein. There is no dispute that criminal intent is an essential element of the crime involved here. See *Morissette* v. *United States*, 342 U.S. 246 (1952). Yet if criminal intent is not alleged in the indictment, there is no assurance whatever that the grand jury found that there was such intent, or was even apprised that such intent was an element of the crime.

The issue of whether criminal intent must be specifically alleged was squarely posed in this case, prior to the *Hughes* decision, by defendant's motion to dismiss the indictment. At that time the Government did not contend that the indictment in fact alleged criminal intent. To the contrary, it stated flatly "the statute says nothing of the intent and neither did the indictment."[3] But, the Government argued, successfully, "it is not necessary to charge criminal intent in this indictment but it must be proved in the trial."

By the time the case reached the Court of Appeals, however, *Hughes* had been decided. Although the Government nevertheless again made the *Doyle* argument, it also now argued, for the first time, that the indictment could be read as alleging criminal intent. It contended that the statutory words "unlawfully and willfully," and the allegation that defendant "well knew" that the expense vouchers were false, were sufficient allegations of criminal intent. And the Court of Appeals accepted this argument, despite the fact that the prosecuting attorney—who presumably drafted the indictment—had conceded that his language was not subject to this construction.

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[3] The relevant excerpt from the brief filed by the Government in the District Court dealing with this matter is reprinted in Appendix C to this petition. The same excerpt was before the Court of Appeals as an appendix to the brief for appellant.

This holding (which, incidentally, conflicts with the decision in *Doyle* that the statutory language does not constitute an allegation of criminal intent) is, we believe, clearly erroneous. The decision of this Court in *Morissette* v. *United States,* 342 U.S. 246 (1952) clearly shows that the words of this statute do not constitute a sufficient allegation of criminal intent. That case involved a very similar statute to this one. It provided that any person who "embezzles, steals, purloins, or knowingly converts" Government property is guilty of a crime. Both the District Court and the Court of Appeals in that case had held that under that statutory language, a defendant could be convicted without proof of criminal intent. This Court reversed, not because criminal intent was required by the statutory language, but because the traditions of the common law dictated that a requirement of criminal intent be read into the statute.

In *Morissette* the Government, of course, argued that neither the words of the statute nor the common law required a showing of criminal intent. But in the present case it argued, and the court below held, that virtually identical words, as used in the indictment in this case, unambiguously convey an allegation of criminal intent! This logic would make sense only to Humpty Dumpty. The plain fact is that the words on their face do not clearly allege criminal intent. If they did, the controversy in *Morissette* would never have arisen.

As this Court long ago held, in a case involving a question of whether knowledge must be alleged where it is an element of the offense:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other

statutes on the like matter, enables the court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." *United States* v. *Carll,* 105 U.S. 611 (1882).

In *Morissette* itself the Court, citing *Carll,* stated:

> "Had the indictment been limited to a charge in the words of the statute, it would have been defective if, in the light of the common law, the statute itself failed to set forth expressly, fully, and clearly all elements necessary to constitute the offense." 342 U.S. at 270 n. 30.

Nor does the allegation in the indictment that defendant "well knew" that the expense vouchers were false constitute an allegation of criminal intent. Indeed, defendant admitted that he knew they were false. The question presented here is whether the indictment adequately alleged that he submitted these admittedly false vouchers with the specific intention of obtaining money to which he knew he was not entitled. We submit that no such allegation can be read into the indictment. The question of whether such an allegation is required should be decided in this case, particularly in light of the conflict referred to above.

III

Throughout the trial of this case, the defendant attempted to prove that although he submitted false expense vouchers to his union, the amounts claimed in those vouchers had actually been expended for legitimate union purposes—albeit not the purposes stated in the vouchers.

The trial court instructed the jury that in order to convict the defendant, it had to find, with respect to each voucher, that it "was not made to reimburse the defendant for money expended on union purposes." (R. 679-80). The court refused, however, to give an instruction, requested by the de-

fendant, that "any expenditures the Defendant made which were authorized by his Union superiors are to be treated as expenditures for a union purpose." (Def. Instr. No. 11, R. 692).

By failing to give this instruction, or any other definition of what would constitute an expenditure for a union purpose, the court left the jury free to decide this question for itself. Thus, if the jury felt that union money should not have been used for the purpose of bringing defendant's family to Puerto Rico, or buying drinks for union members, or traveling to the Virgin Islands to organize sugar workers, it was free to find that these were not legitimate "union purposes," even if it believed that these expenditures were actually made and actually authorized by the union officers.

This, we submit, presents a basic question of interpretation of Section 501(c). If a union officer or employee spends union money for a purpose which the union has authorized, can he nevertheless be convicted of embezzling, stealing, converting, or abstracting that money if a jury determines, on the basis of its own ideas as to the proper use of union money, that the expenditure was not for a union purpose?

This question is important not only under Section 501(c), but under 501(a) and 501(b) as well. Section 501(a) provides that union officers and agents must hold union money and property "for the benefit of the organization," and spend it "in accordance with its constitution and bylaws." Section 501(b) provides for civil enforcement of 501(a) by means of a civil action, either by the union itself or by an individual member acting derivatively on the union's behalf. When a particular use of union money is challenged in such an action, what is the standard to be applied? Is it whether the particular expenditure was properly authorized, or whether it meets some objective standard of the proper use of union money?

The legislative history of the statute suggests that it was only intended to assure that union money is spent in a man-

ner authorized by the union. See H.R. Rep. No. 741, 86th Cong., 1st Sess. 81-82 (1959); 105 Cong. Rec. 17900 (Sept. 3, 1959) (Report of Senator Kennedy on results of Senate-House Conference). See also Cox, *Law and the National Labor Policy* 93 (1960); Smith, *The Labor-Management Reporting and Disclosure Act of 1959,* 46 Va. L.Rev. 195, 228 (1960). At least one commentary has suggested, however, that some objective standard may be implicit in the civil provisions of the statute. Note, 73 Yale L. J. 443 (1964).

Closely related to the question of what is a proper use of union money under either the civil or criminal provisions of Section 501 is the question of who has the burden, in a criminal prosecution under 501(c), of proving whether expense money received by a union officer or employee was spent for a legitimate union purpose. In this case, the Government introduced no evidence to show that Colella had not in fact made expenditures for union purposes equal to the amounts he received as a result of the false expense vouchers. Thus, if the burden was on the Government to prove that Colella not only received union money but that he spent that money for non-union purposes, the defendant's motions for a judgment of acquittal should have been granted. The Court of Appeals, however, held in effect that the burden of proof was on the defendant. It stated that the motions for acquittal were properly denied because the jury might have disbelieved the defendant's evidence concerning his expenditures, or might have believed that there was a balance unaccounted for.

These basic questions of interpretation of this statute will inevitably recur again and again, unless they are finally resolved by this Court. We believe they should be resolved in this case. This Court should not permit this conviction to stand, and the distinguished career of this defendant to be seriously marred and perhaps even destroyed, while such basic questions as to the validity of his conviction remain unresolved.

IV

As this Court has recently re-emphasized, the Fifth Amendment guarantees "the right of a person [accused of crime] to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964). This basic right "reflects many of our fundamental and most noble aspirations," not the least of which is "our preference for an accusatorial rather than an inquisitorial system of justice." *Murphy* v. *Waterfront Comm'n of New York,* 378 U.S. 52, 55 (1964).

This case presents the question of whether it is consistent with these constitutional principles for a federal court in a criminal case to require defense counsel to state his version of the case, in an opening statement, before the Government has even put in its evidence, or give up the right to make any opening statement at all. We believe this question is one which should be resolved by this Court.

In the federal courts, defendants are usually permitted to defer their opening statement until the Government has completed its case in chief. In state courts, however, defendants are frequently required to make their opening statement at the beginning of the trial or not at all. See Annot., 93 A.L.R.2d 951 (1964). So far as we have been able to determine, the constitutionality of this practice has been passed upon by only two courts, both of which held it to be constitutional. *Savitt* v. *United States,* 59 F.2d 541 (3d Cir. 1932); *State* v. *Magnuson,* 46 S.D. 156, 191 N.W. 460 (1922). These decisions are quite dated, however, and neither of them contains an extensive consideration of the problem.

To require the defendant to make an opening statement at the beginning of a trial places him in a serious dilemma. If he makes an opening statement, he may well assist the prosecution, by revealing the nature of his defenses. He may also commit himself to prove certain facts which, after

the Government's case is in, he may prefer not to prove at all. On the other hand, if he waives the opening statement, he gives the Government the advantage of having two opportunities to summarize its version of the case, at the opening and at the close, while retaining for himself only the right to make a closing argument. Whether this dilemma infringes the defendant's right to state his version of the case only if and when he chooses to do so "in the unfettered exercise of his own will" is, we believe, an important constitutional question which should not remain undecided.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1966.

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTE AND RULES INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 501(c) of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 535, 29 U.S.C. § 501(c), provides as follows:

> Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or in-

directly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Rule 7 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> (a) **Use of Indictment or Information.** . . . An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. . . .
>
> (c) **Nature and Contents.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . .

Rule 41(e) of the Federal Rules of Criminal Procedure provides as follows:

> **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before

trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 6513.

ANGELO COLELLA,

Defendant, Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge,*
MARIS* and COFFIN, *Circuit Judges.*

Albert L. Goldman for appellant.

Wallace H. Johnson and *Peter R. Richards,* Attorneys, Department of Justice, with whom *Fred M. Vinson, Jr.,* Assistant Attorney General, was on brief, for appellee.

OPINION OF THE COURT

April 21, 1966.

COFFIN, *Circuit Judge.* This is an appeal from a judgment of the District Court for the District of Puerto Rico, following jury trial in a criminal action alleging violations

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* By designation.

of Section 501(c) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(c).[1]

The indictment contained six counts, similar except in amounts of money and in the description of the particular manner of commission of the crime alleged. Count One alleged that:

> ". . . the defendant herein, while employed by the International Union of Electrical, Radio and Machine Workers (IUE) AFL-CIO, a labor organization within the meaning of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402(i) and (j)), embezzled, stole and unlawfully and willfully abstracted and converted to his own use, monies and funds belonging to said labor organization, approximately $174.30, which monies and funds were obtained by the defendant herein while acting as such employee on behalf of the said labor organization, in the following manner:
>
> "The defendant Angelo Golella falsified vouchers to be reimbursed for hotel expenses incurred while allegedly staying at the La Rada Hotel, Santurce, Puerto Rico, during the month of March, 1961, falsely showing expenses to be $159.35 and $194.70, when he well knew that the true expenses incurred were in the amount of $179.75. He received payments from the aforementioned labor organization in accordance with the referred falsified vouchers."

The other counts similarly alleged other amounts totalling

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[1] Section 501(c) provides:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

$2,910.67, obtained by falsifying vouchers for hotel expenses and automobile rentals.

Defendant, an experienced labor union organizer, currently President of the Congress of Industrial Organizers, was asked by the then Secretary-Treasurer of IUE, Alvin Hartnett, to go to Puerto Rico in the spring of 1961 to stave off a threat from allegedly communist forces to take over IUE's local unions, to settle a major strike, to resolve a dispute among officers of IUE's largest local, to consider the merits of an internal administrative reorganization, and generally to improve IUE's image in Puerto Rico.

Defendant went to Puerto Rico, arriving in late February 1961, and staying until June. His accomplishments were not inconsiderable. He helped bring about the affiliation with IUE of five locals; participated in two strikes and settlements that were favorable for IUE; helped in two other negotiations; advised on grievances with two other companies; helped resist raids from hostile unions in two other cases; and, in the opinion of one witness improved the public image of IUE in Puerto Rico.

During this period, defendant testified that he spent substantial sums in paying for lunches and dinners for organizers, feeding workers on picket lines, paying for medicine for some, paying for meetings and conferences. He had kept no records and was unable to be specific as to amounts. Others corroborated the fact that he frequently paid for food and drinks without attesting to precise amounts. He also covered the expenses of a several weeks' stay of members of his family in Puerto Rico, which, he said, had been authorized by the Secretary-Treasurer, as an inducement to persuade him to stay in Puerto Rico. A rough total of amounts which defendant testified he spent for his own board and lodging, for other union purposes, and for his family, is in excess of $4,000.

He made no effort to submit vouchers for reimbursement based on his actual expenditures but, instead, the govern-

ment proved and he freely admitted that he inflated or fabricated hotel bills and fabricated car rental bills to serve as a basis for his reimbursement. Defendant testified that he followed this course pursuant to long standing instructions of Hartnett, IUE's Secretary-Treasurer, to recover monies spent for liquor, for payments to picket captains, and for other purposes "which could not be covered by strike relief" by inflating hotel or motel bills. Some ten other witnesses testified to having pursued this practice, with six of them attributing the instructions to do so to Hartnett.

The existence of such instructions was denied by Hartnett. Both the President, James Carey, and the Controller denied any knowledge of such a practice. In fact, defendant testified that Carey had later strongly criticized him for falsifying vouchers. There was evidence of an internal fight between Carey forces and Hartnett forces, with Hartnett using his alleged power to approve falsified vouchers as a device to reward his supporters and punish his opponents. Finally, there was evidence that defendant disliked the practice he and others had engaged in and sought to obtain a higher per diem allowance for organizers so that resort to subterfuge would not be necessary.

This summary of a hard fought fourteen day trial is admittedly incomplete and, to the extent that it favors either party, favors defendant. The jury returned verdits of guilty on each count, imposition of sentence was suspended and the defendant placed on probation for three years. On appeal he urges reversible error at every stage from an arrest and seizure preceding the indictment to the instructions which the district court gave the jury. We have carefully reviewed the record of nearly 700 pages, the numerous exhibits, and the extensive briefs of counsel. We find no reversible error.

I

The first area of alleged error lies in the acquisition and

use of evidence leading to the indictment. Defendant argues that there was no probable cause for the complaint and the arrest warrant against him; that the search and seizure incident to his arrest were therefore unlawful; that certain testimony of one Mendez before the grand jury resulted from the search; and that therefore the indictment was invalid.

The complaint contained the following allegations: (1) that defendant was an employee of IUE; (2) that he willfully and unlawfully embezzled and converted monies of IUE; (3) that he did so by falsifying an expense statement at a named hotel; (4) that the charge was based on an FBI investigation; and (5) that a named person, whose address was the named hotel, was a material witness. The warrant duplicated this information, except that it did not allege that IUE was defendant's employer, that there had been an FBI investigation, or that there was a material witness. At 2:30 a.m., on the day following the issuance of the warrant, defendant was arrested at a hotel, the officers announcing that they had a warrant for defendant's arrest, searching him, and taking a writing tablet and envelope lying on an open suitcase which defendant identified as his personal papers. The officers, after some scrutiny, stated that they were taking these as incidental to the arrest. No other search was made.

We hold that both the complaint and the warrant were valid. The averments of the complaint alleged the commission of a crime, the means used to commit it, the means used to discover it, and the name of a material witness. This is far more than the meager conclusory averment in *Giordenello* v. *United States,* 1958, 357 U.S. 480, cited by defendant, and even more complete and specific than the averments in *Jaben* v. *United States,* 1965, 381 U.S. 214. The defendant attacks the complaint for its failure to allege directly a fiduciary relationship, criminal intent, or the receipt of money by him pursuant to the false statement. To adopt such argu-

ments would be to indulge in an overtechnical analysis of the complaint. *Cf. United States* v. *Ventresca,* 1965, 380 U.S. 102. What we have said about the complaint is equally applicable to the warrant, which charged both a crime and the means of committing it, in language similar to that of the complaint, omitting only the allegations of employment, and of the nature of the supporting evidence.

There remain the questions relating to the seizure of the writing tablet and envelope and the relation of any information thereby obtained to the proceedings of the grand jury. The writing tablet contained a page of notes of defendant's conversations with one Mendez and one Ugarte, employees of the IUE office in Puerto Rico, which reported them as saying that they had followed Hartnett's instructions (presumably as to falsifying vouchers) through fear of losing their jobs. The envelope contained intra-union correspondence in which the President, acting on an accounting report, called on various members (including defendant) to explain or justify their expense accounts and their replies, together with mimeographed reports of meetings on this investigation and newspaper clippings.

We do not reach the question whether these papers, as argued by the government, were instrumentalities or fruits of a crime, or, as defendant contends, were purely evidentiary. For there is no showing that the fruits of the search were used, directly or indirectly, against defendant. The papers seized were not presented to the trial jury, being merely marked for identification by defendant. The alleged taint relates only to the proceedings of the grand jury and is based on (1) the fact that among the papers seized was one sheet with defendant's notes of his conversation with Mendez; (2) the fact that although Mendez had refused to answer questions of government agents before defendant's arrest and the seizure of his papers, he later testified before the grand jury; and (3) the averment that Mendez' testimony before the grand jury related to each count of the indictment.

It seems clear that, even if the seizure of defendant's notes relating to Mendez were illegal, there is no evidence that the indictment was thereby tainted. The substance of the seized notes did not relate to defendant but to Hartnett. The only possible contributions they could have made to the government's case were the identification of Mendez, and the fact that he was acquainted with the internal operations of the IUE office in Puerto Rico. But the government already knew this. As an IUE staff man in Puerto Rico, Mendez was a logical point of inquiry. And agents had already sought him out. At that time Mendez refused to answer questions or give a statement. Under the subsequent compulsion of a grand jury subpoena he did testify. The government's preexisting awareness of Mendez, from a source independent of defendant's notes, excludes this case from the proscription of *Silverthorne Lumber Co., Inc.* v. *United States,* 1920, 251 U.S. 385, 392. Moreover, the FBI investigation, the identification of a material witness in the complaint, and the essentiality of documentary evidence such as vouchers to the government's case rule out any inference that substantial, competent evidence from other sources was lacking before the grand jury. Nor is there any such contention. See *Costello* v. *United States,* 1956, 350 U.S. 359, 362-363; *Coppedge* v. *United States,* D. C. Cir., 1962, 311 F.2d 128, *cert. denied,* 1963, 373 U.S. 946; *Anderson* v. *United States,* 8 Cir., 1921, 273 Fed. 20, *cert. denied,* 257 U.S. 647.[2]

[2] At the trial Mendez was called by defendant as a witness. Defendant was precluded from asking if he had refused to give a statement to the government before defendant's arrest and if he had subsequently testified before the grand jury. Defendant made an offer of proof and Mendez left the stand. We are therefore not faced with the application of *Wong Sun* v. *United States,* 1963, 371 U.S. 471, 491.

II

There having been no violations of defendant's constitutional rights, we now consider the question of the validity

of the indictment on its face. Defendant alleges reversible error in the court's refusal to dismiss the indictment for failure to state facts constituting a federal offense. The specific defects alleged are failures to allege criminal intent and fiduciary relationship.

As to intent, defendant contends that the indictment must charge wrongful or felonious intent, and that there is no word or combination of words in the indictment which constitutes a sufficient allegation.

We think it clear that the indictment adequately charges felonious intent. Paraphrased, each count alleges embezzlement, theft, unlawful and willful abstraction, unlawful and willful conversion to defendant's own use, all by means of an expense voucher falsified by defendant who received money therefrom when he "well knew" expenses had, in whole or in part, not been incurred. While defendant asserts in his brief that he "could have performed every specific act in the indictment and be innocent", we can think of no circumstances where this would be so. One could not innocently embezzle or steal. One could not unlawfully and willfully abstract or convert to his own use money belonging to the union, on the basis of a false voucher well knowing it to be false, pocket the proceeds, and still be innocent.

Defendant strenuously urges that such a result follows because the word "willfully" does not import knowledge of a wrongful act or a larcenous intent but means merely "voluntary". We cannot agree. While, as we have recognized in *Zimberg* v. *United States,* 1 Cir., 1944, 142 F.2d 132, 137, *cert. denied,* 323 U.S. 712, "willfully" is "a word of many meanings" (citing *Spies* v. *United States,* 1943, 317 U.S. 492, 497), we consider applicable to this case the following language from *United States* v. *Illinois Central Railroad Co.,* 1938, 303 U.S. 239, 242: "In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like." The indictment in this case sufficiently alleges crimi-

nal intent. It meets the requirement of *United States* v. *Carll*, 1882, 105 U.S. 611.

In *Doyle* v. *United States*, 8 Cir., 1963, 318 F.2d 419, the same argument as to lack of averment of felonious intent was made against the validity of an indictment arising from the same statute involved in this case. The indictment was less complete than the one we confront, lacking the averments, in the second paragraph of each count. Without saying, as we have here, that the indictment sufficiently alleged criminal intent, the court nevertheless held the indictment valid since (319 F.2d at 421) ". . . it adequately and fully informs the appellant of the charge against her . . ." and ". . . is also sufficiently specific in identifying the crime so that a conviction or acquittal thereof could be grounds for the defense of double jeopardy . . . ." The court took note of the charge to the jury on the issue of intent, which there as here was adequately presented, and observed (318 F.2d at 422) that the judge ". . . treated the element of criminal intent as an essential part of the offense and that the case was tried and submitted to the jury with intent being a prerequisite to conviction."

The authorities cited by defendant to the contrary are not compelling. *Morissette* v. *United States*, 1952, 342 U.S. 246, did not concern the validity of an indictment, but rather dealt with the fatal error committed by the trial court in taking away from the jury the issue of intent. The Court, contrary to defendant's impression of the opinion, made it quite clear that the element of evil purpose has often been expressed by courts in their charges (342 U.S. at 252) and by Congress in its statutes (342 U.S. at 264) through the use of the word "willfully". Our own case, *Hughes* v. *United States*, 1 Cir., 1964, 338 F.2d 651, *rehearing denied*, 1965, 340 F.2d 609, while requiring allegation of felonious intent in an indictment, merely held that "unlawfully" falls short of such allegation.

We come now to the failure of the indictment to allege

a fiduciary relationship. Defendant asserts that insofar as embezzlement is concerned, the existence of a fiduciary relationship is necessary and must be alleged. He also contends that the bare allegation of an employer-employee relationship falls short of an allegation of a fiduciary relationship. Since such must be alleged in an indictment charging embezzlement, *Moore* v. *United States*, 1895, 160 U.S. 268, it follows, argues defendant, that the indictment is defective.

This argument pushes too far. Its thrust is a limited one. We are not dealing with an indictment charging simply embezzlement. Section 501(c) establishes "a new federal crime of embezzlement of any funds of a labor organization." [3] The new crime can be accomplished in one of four ways: embezzling, stealing, unlawfully and willfully abstracting, and unlawfully and willfully converting. But to the extent that terms with a traditional meaning are used, those meanings are still applicable. Embezzlement is one of such terms and carries with it the concept of a breach of fiduciary relationship.[4] Congress spelled out in Section 501(a) its own definition, saying that every "officer, agent, shop steward, and other representative" shall occupy a

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[3] S. Rep. No. 187, 86th Cong., 1st Sess. (1959); H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959); *Woxberg* v. *United States*, 9 Cir., 1964, 329 F.2d 284, 290, *cert. denied*, 379 U.S. 823 (1964).

[4] *Woxberg* v. *United States, supra,* at 290: "The terms used in the legislation retain their common law meaning." While this sentence may not strictly apply to embezzlement, a statutory crime, it seems to be clear that the Congress intended to continue to predicate the embezzlement method of committing the new federal crime of embezzlement upon a breach of fiduciary responsibility. The Supplementary Views of Congressmen Elliott, Green, Thompson, Udall, and O'Hara stated: "Although the common law covers the matter, we considered it important to write the fiduciary principle explicitly into Federal labor legislation." H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959). The Minority Views, in the Senate, of Senators Dirksen and Goldwater stated that "This provision [as to embezzlement] gives union members nothing they do not already have." S. Rep. 187, 86th Cong., 1st Sess. (1959).

"position of trust." It further refined this definition by saying, in Section 402(q), that these classes include "elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise independent authority), but does not include salaried non-supervisory professional staff, stenographic, and service personnel."

The indictment as drawn in this case might have applied as well to a custodial employee as to defendant, who in fact was an organizer who exercised independent authority. We see no reason why, if the government wishes to preserve for itself the opportunity to prove that the new federal composite crime established by Section 501(c) was committed by the means of traditional embezzlement, it should not set forth in the indictment a sufficient allegation as to fiduciary relationship.

But failure to do so, it seems to us, makes very little difference to either party. As far as the government is concerned, we cannot imagine facts constituting embezzlement which would not also, absent a fiduciary relationship, make out unlawful and willful abstraction or conversion. As far as the defendant is concerned, he has been placed in jeopardy with respect to all means of committing the offense by the proper manner of substitution in the indictment of the conjunctive "and" for the statutory disjunctive "or". *Crain* v. *United States,* 1896, 162 U.S. 625, 636; *Kitchens* v. *United States,* 10 Cir., 1959, 272 F.2d 757; *cert. denied,* 1960, 362 U.S. 942.[5]

The defect goes only to one means of committing the crime charged in the indictment and defined in Section 501(c). In *Doyle* v. *United States, supra,* a similar indictment under the same statute was attacked for lack of allegation of fiduciary relationship. The court, after discussing

[5] While the indictment in *Doyle* v. *United States, supra,* was in the disjunctive, the point does not seem to have been raised.

the several means of committing the statutory crime, held 318 F.2d at 423: "It is not an essential element of the crime charged that the moneys had been held by the appellant in some fiduciary capacity." The defendant has failed to claim or show that the defect as to one means of commission infects the indictment as to all others. While the government failed to profit in its draftsmanship from *Doyle*, the indictment must stand valid.[6]

III

We now consider numerous errors alleged during the conduct of the trial.

Defendant asserts reversible error for the court's refusal to grant his motions to return the papers seized from him. The alleged damage lay not in the use of these papers in the trial, for they were never admitted in evidence. Rather, the prejudice lay, says defendant, in that he and his counsel did not have the benefit of knowledge of the contents for purpose of preparation until the last day and one half of a thirteen day trial. He eventually gained access to the papers by subpoenaing a government agent as his seventeenth witness. He could have acted much earlier. But, more to the point, as government counsel points out, defendant could at any time after indictment have made a motion under Rule 16 of the Federal Rules of Criminal Procedure to inspect and copy items "belonging to the defendant" on a showing that they "may be material to

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[6] While it is possible to read *Doyle* as saying that a fiduciary relationship is no longer an essential element of the embezzlement means of committing the new federal crime, we think it more reasonable to read it as saying that such a relationship is not essential to the three other means and that therefore the absence of its allegation in an indictment is not fatal as to these other means. In passing, we may observe that the defendant was in no way factually prejudiced by the alleged defect in the indictment, it being indisputably clear, on his own admission, that he occupied the fiduciary relationship requisite for the crime of embezzlement.

the preparation of his defense". We see no prejudice to defendant resulting from denial of his motions to return property.[7]

Defendant attempts to find error in the rejection by the trial judge of testimony or offers of proof of probable testimony from nine witnesses. We have combed the entire record for possible prejudice. We have found none. We reproduce the results of our research in the margin.[8] With one insignificant exception, each bit of stricken or refused testimony has been amply duplicated elsewhere in the record. There is no question of law here. The two principal areas where defendant claims to have been denied sufficient leeway in his proof concern evidence as to prior authority and widespread practice indicating lack of criminal intent. Such proof, whether or not it should have been admitted,

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[7] Our reading of the seized file fails to suggest how it would have been of any utility to defendant at trial or before. He was, of course, generally aware of the contents since the papers had been in his possession.

[8]

Witness	*Testimony Stricken or Refused*	*Other Evidence Admitted on Point in Issue*
Ugarte	Defendant's family authorized to come to Puerto Rico.	Stricken only after eight intervening pages of testimony; testified to independently by Bauer and defendant.
Bauer	Defendant's family authorized to come to Puerto Rico.	Later admitted by the court.
	Contest for power between Carey and Hartnett.	Testimony of Pugliano and defendant.
	Hartnett's authorizing Pierce and Barker to falsify vouchers.	Testimony of Pierce.

was admitted in abundance. The liberal attitude toward such evidence urged in *United States* v. *Matot*, 2 Cir., 1944, 146 F.2d 197, 198-199, has been amply observed. The other major point urged was that defendant himself sought to bring about a change in the system. Whether or not this point was relevant, it was forcefully though briefly made by witness Pugliano.

Defendant asserts that the court made comments on two occasions in the presence of the jury which prejudiced him. The first was a statement that proof of a practice of falsifying vouchers would require a board resolution or written directive of the head of the union. We see little substance in this. The fact is that the judge allowed some ten witnesses to testify as to their knowledge of and participation in

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[8] *Witness*	*Testimony Stricken or Refused*	*Other Evidence Admitted on Point in Issue*
Pierce	Additional evidence of practice of falsifying vouchers.	Pierce had testified that most of 18 organizers he had named knew of false vouchers and many used them. In addition there was testimony of 9 other witnesses (Ugarte, Bauer, Adams, Barker, Pugliano, Copeland, McCue, Campbell, Otero).
Carey	Conversation with defendant in December 1961. Practice of falsification before June 1961. Hartnett's instructions to organizers. Discussion with defendant in April 1961.	Defendant's testimony to same effect. Ten other witnesses (see comment after Pierce). Testimony of defendant and 6 other organizers. No offer of proof as to content, but the judge summarized the prob-

this practice, and his charge, as we shall note, allowed the jury to exonerate defendant if it found that the funds had been spent for union purposes. If error was committed, it was in ignoring 29 U.S.C. § 501(a) which prohibits exculpatory resolutions purporting to relieve violations of the statute. If error, it favored defendant.

The second allegedly prejudicial comment involves a misreading of a letter by the judge in which, by confusing defendant with an employee of the San Juan office, he inadvertently supported a government witness rather than defendant on a minor point. Such an error in the course of a fourteen day trial involving 27 witnesses did not prejudice defendant. The court was careful to admonish the jury to rely on its own impressions of the evidence.

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[8] *Witness*	*Testimony Stricken or Refused*	*Other Evidence Admitted on Point in Issue*
		able substance favorably to defendant.
Pugliano	Talks with defendant about changing system of falsifying vouchers. (Testimony limited.)	Basic point was made that defendant felt change needed and that he was seeking adequate per diem.
Copeland	Conversation with Hartnett on Pugliano's bill.	Testimony of Pugliano.
Campbell	Hartnett's authorization to take his family on a job.	All admitted.
Otero	Defendant's expenditures at a convention celebration.	No other evidence.
Hartnett	Defendant's proposal to increase per diem in order to avoid falsification.	Testimony of Pugliano.

Defendant, at the outset of trial and at the conclusion of the government's case, made a motion that the government be required to elect the offense it would seek to prove. This motion proceeded on the erroneous assumption that several crimes were involved. We have already stated our opinion based on Senate and House Reports, that one new statutory crime was charged, the commission of which could be accomplished by various means. There was no reason for the government to be forced to elect. See *Woxberg* v. *United States, supra,* at 290; *cf. United States* v. *Harmon,* 6 Cir., 1964, 339 F.2d 354, 357-358, *cert. denied,* 1965, 380 U.S. 944.

At the conclusion of the government's case and again at the conclusion of all the testimony, defendant moved for a judgment of acquittal. As to the former it is sufficient to say that a motion so made, followed by testimony for the defense, constitutes an abandonment of that motion. *Benchwick* v. *United States,* 9 Cir., 1961, 297 F.2d 330; *Gaunt* v. *United States,* 1 Cir., 1950, 184 F.2d 284, *cert. denied,* 1951, 340 U.S. 917.

As to the latter motion, made at the conclusion of all the evidence, defendant asserts that there was insufficient evidence to justify a finding by the jury of criminal intent and conversion to defendant's use. Our standard of review is that of determining whether the evidence viewed most favorably to the government and all reasonable inferences therefrom support the jury's verdict. *United States* v. *Quagliato,* 7 Cir., 1965, 343 F.2d 533, *cert. denied,* 381 U.S. 938; *Genstil* v. *United States,* 1 Cir., 1964, 326 F.2d 243, *cert. denied,* 377 U.S. 916.

Using this standard, we cannot say the jury was irrational in its finding of guilt. The knowledge of the falsity of expense vouchers was admitted. Despite the parade of defendant's witnesses attesting to the practice of falsity, the jury had heard the President, Secretary-Treasurer, and Comptroller of the union testify to their ignorance of such

a practice and the lack of authority. While defendant and a number of other witnesses testified to defendant's having spent money liberally for lunches, drinks, prescriptions, travel, and other union purposes, the jury could have disbelieved all. Or, believing much of this testimony, it could have believed there was a balance unaccounted for and willfully and wrongly converted to defendant's own use. The jury might well have considered that witnesses had testified to a practice of falsity relating chiefly to liquor expense and have felt there was no good reason why defendant failed to obtain and forward receipts for food, travel, and other respectable items making up the largest part of his expenditures. It might have believed the union Secretary-Treasurer that defendant had no authority to bring his family to Puerto Rico. It might have drawn adverse conclusions from the destruction of minutes of a union meeting devoted to charges of falsity, the deposit of some monies in defendant's personal bank account, or even an attempt in defendant's presence to change the testimony of witness Ugarte.

The district court properly allowed the jury to make its own assessment of the evidence.

Finally, defendant attacks the instructions to the jury in several respects. The major alleged error was an instruction ". . . as a matter of law that the defendant Colella was . . . in a position of trust as to money he received as expenses from [IUE]. Therefore, you are instructed as a matter of law that a fiduciary relationship existed . . . ."

We agree that this instruction was error. We do so, not on the state of the evidence (which, even from defendant himself, amply justified the conclusion that he was an organizer exercising "independent authority"), but as the natural consequence of our holding that a fiduciary relationship was not alleged in the indictment. This, however, does not vitiate the validity of the jury's verdict, the charge being accurate in other respects. For every element, other

than fiduciary relationship, is also included in either or both unlawful and willful abstraction and unlawful and willful conversion.

A second allegation of error was that the court did not define the elements of each offense charged. As we have said before, there is one statutory offense, with several means of commission. The court adequately defined conversion in instructing "to convert to his own use . . . means intent to apply or appropriate or use for the benefit or profit of the person or persons unlawfully doing the act." It gave no equivalent definitions for abstracting and stealing. No objection or request was made on these points. We see no prejudice to defendant's rights. In *United States* v. *Northway,* 1887, 120 U.S. 327, 334-335, the Court referred to "abstract" as a word "of simple popular meaning, without ambiguity." If this is so, "stole" is crystal clear.[9]

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[9] Defendant cites *Williamson* v. *United States,* 5 Cir., 1964, 332 F.2d 123 as support for the alleged inadequacy of the instructions on this point. In that case the court found plain error in a charge relating to the testimony of an accomplice. The court went on to criticize the "summary" nature of the charge defining the elements of the crime. While the offenses proscribed by the statute (18 U.S.C. § 656) included embezzlement, abstraction, purloining, and willful misapplication of bank funds, the judge confined himself to misapplication, defining this by using the word "conversion" which he left undefined. He did not instruct on what was required to establish any element beyond a reasonable doubt. There was no attempt to define "willful" or "intention". The charge in the case at bar, lengthy and detailed, made after ample consideration of requests, adequately treated both the issue of reasonable doubt and that of criminal intent.

One other point in *Williamson* deserves comment. The court asked how, under the charge, one could ascertain whether the jury found defendant guilty of misapplication, of embezzlement, of abstracting, or of purloining. Since the same question was asked of us by defendant in oral argument, we state that the crime for which defendant was convicted was the new federal statutory crime as defined in 18 U.S.C. § 501(c). Apparently in *Williamson* the court felt that the statute was a recodification which embraced several separate crimes. 332 F.2d 123, 133 n.15.

The court's charge, as to the spending of money for union purposes, objected to by defendant, was as follows: "As to each count of the indictment, in order to warrant the defendant's conviction, the evidence must convince you beyond a reasonable doubt that the defendant submitted his requests for payment with the criminal intent to obtain money which had not been spent for a union purpose and did thereafter use that money for a non-union purpose." Defendant claims that he was prejudiced by the omission of the words, "whether such expenditures were or were not authorized". We see little difference between the shorter and the longer version. In either case if the jury felt that the defendant had spent for a union purpose, albeit unauthorized, they were to find him not guilty. There is no error in this part of the charge.

The final averment of error is that instead of charging, as requested, that false requests for reimbursement were not commissions of crime, the court said such a request was not "in itself" a commission of crime. While the innuendo added by the court lessened the strength of the charge defendant sought, we find this instruction a fair one.

Defendant's conviction undoubtedly seems to him unjust in our expense-account society. The finding of guilt and the imposition of a penalty in this case stem from two facts: Congress passed a criminal statute and the jury did not accept defendant's proof.

Affirmed.

APPENDIX C

EXCERPT FROM DISTRICT COURT BRIEF FOR UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT.

* * *

4. The *Morissette* case cited by defendant is in complete agreement with the Government's theory in this case.

Morissette was indicted on the charge that he "did unlawfully, wilfully, and knowingly steal and convert" property of the United States in violation of 18 U.S.C. 641, which provides, in words very similar to those in 29 U.S.C. 501 (c), that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable with fine and imprisonment. The statute says nothing of the intent and neither did the indictment, which is the situation in our present case. At the trial Morissette testified that he did not intend to steal the property and he took it with no criminal or wrongful intent but because he thought it was abandoned. The trial court ruled it was only necessary that he intended to take the property and the Court of Appeals affirmed.

Mr. Justice Jackson distinguished the offense charged against Morissette from the offenses in the *Behrman* and *Balint* cases (pp. 250 ff.), and found that Congress omitted any express prescription of criminal intent from the statute for the reason that criminal intent is inherent in the class of offense charged (p. 261-2), and also that such omission was not any ground upon which to infer that criminal intent was eliminated from the offense charged. (pp. 263-73).

Therefore, it is not necessary to charge criminal intent in this indictment but it must be proved in the trial.

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